

REC'D AUG 22 REC'D

Name: Paul William Grace

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District Court

APPLICATION

PERSONAL

1. Full Name	Paul William Grace			
2. County of Residence	Santa Fe			
3. Birthplace	Dunkirk, New York			
4. If born outside the US, give the basis for your citizenship	N/A			
5. Birth Date	1952			
6. Marital Status	Widower			
7. If married, list spouse's full name	N/A			
8. Spouse's occupation	N/A			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
7/1/2000 to Present	1 Sombra Court	Santa Fe	NM	87508

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)				
High School(s)	St. Mary's Seminary (Garrison NY) 1966-1969 Archbishop Molloy High School (Queens NY) 1969-1970 (HS Diploma)			
College(s)	Queens College (NY) 1970-1974; B.A., Political Science, 1974			
Law School(s)	Southwestern University School of Law, Los Angeles, CA, 1974-1978; J.D., 1978; Editor in Chief, Southwestern University Law Review 1977-78			

12. Bar Admissions and Dates	California (1978); District of Columbia (1988); Maryland (1991); New Mexico (2005)
------------------------------	--

EMPLOYMENT

13. List Your Present Employment				
Date(s) of Employment	February 1, 2013 to Present			
Employer	Paul W. Grace, L.L.C.			
Mailing Address	117 North Guadalupe Street, Suite A, Santa Fe, NM 87501			
Business Phone	505-690-8505			
Position	Attorney			

Duties	Legal representation of clients
Supervisor	N/A
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	2006-2013
Employer	Hemphill & Grace, P.C. (formerly Linda G. Hemphill, P.C.)
Mailing Address	834 Dunlap Street, Santa Fe, NM 87501
Business Phone	505-986-8515
Business FAX	505-986-1132
Employer's Email Address	linda@hemphillfirm.com
Position	Attorney (non-equity partner)

Dates of Employment	1997-2006
Employer	Law Office of Paul W. Grace
Mailing Address	1 Sombra Court, Santa Fe, NM 87508 (prior to 2000 in Highland, MD)
Business Phone	505-466-7177
Business FAX	505-466-7178
Employer's Email Address	pgrace2003@comcast.net
Position	Attorney

Dates of Employment	1991-1997
Employer	Tydings & Rosenberg
Mailing Address	100 E. Pratt Street, Baltimore, MD 21202
Business Phone	410-752-9700
Business FAX	410-727-5460
Employer's Email Address	N/A
Position	Partner

Dates of Employment	1988-1991
Employer	Graham & James
Mailing Address	Washington, D.C. (merged 2000)
Business Phone	N/A
Business FAX	N/A
Employer's Email Address	N/A
Position	Partner

Dates of Employment	1980-1988
Employer	Federal Home Loan Bank Board
Mailing Address	Washington, D.C. (replaced by the Office of Thrift Supervision 1989)
Business Phone	N/A
Business FAX	N/A
Employer's Email Address	N/A
Position	Trial Attorney; Senior Associate General Counsel and Director of FSLIC Litigation

Dates of Employment	1978-1979
Employer	Law Office of Paul W. Grace
Mailing Address	Los Angeles, CA
Business Phone	N/A
Business FAX	N/A
Employer's Email Address	N/A
Position	Attorney

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:

Answer 15: None currently; however, I share space with Christopher Carlsen, Esq., and we occasionally represent clients together. From 2006-2013 I practiced with Linda Hemphill in the firms of Linda G. Hemphill, P.C. and Hemphill & Grace, P.C. From 1988-1991, I was a partner at the international law firm of Graham & James; from 1991-1997, I was a partner in the Baltimore firm of Tydings & Rosenberg. I have not kept in touch with my former partners at either firm.

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: Extensive since 2006, mostly representing plaintiffs.

17. How extensive is your experience in Commercial Law?

Answer 17: Extensive experience in banking law and regulation since 1980, and more recently in employment and construction disputes. I have represented several small business and numerous individuals with respect to commercial matters.

18. How extensive is your experience in Domestic Relations Law?

Answer 18: I do not represent clients in domestic relations cases (with the exception of guardianships). However, I have been mediating domestic relations cases for more than four years, both through the First Judicial District Court's ADR Office and as a volunteer attorney on Resolution Day in Family Court.

19. How extensive is your experience in Juvenile Law?

Answer 19: Limited.

20. How extensive is your experience in Criminal Law?

Answer 20: Limited experience during private practice in California (1978-79).

21. How extensive is your experience in Appellate Law?

Answer 21: During the past 12 years, I have briefed two cases in the New Mexico Court of Appeals and one in the New Mexico Supreme Court. During my tenure with the federal government, I briefed and argued dozens of cases in federal appellate courts around the country. Early in my career, I briefed several cases in the California appellate courts and the United States Supreme Court, and successfully argued a criminal appeal in the California Supreme Court.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: I have tried five civil cases to a jury, one of them within the last two years.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: I have tried approximately fifteen civil cases in state and federal courts. Five of those cases were tried in the last two years.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: I have briefed and argued dozens of civil appeals in federal appellate courts, one criminal appeal in the California appellate courts (and the US Supreme Court), and three civil appeals in the New Mexico appellate courts (including the Supreme Court). One of those appeals occurred within the last two years.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates

Public Office	Dates
Notary Public, State of New Mexico	2008 to present

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
N/A		

27. Activities in civic organizations, including offices, held, for last 10 years

Civic Organization	Position Held	Dates
Congregation Beit Tikva	President, Secretary, Trustee	2004 to present (president 2006-2010 and 2016 to present; secretary 2012 to 2015)
Santa Fe American Little League	President, director, manager, coach, umpire	2001 to present (president 2006-present)
Little League (New Mexico District One)	Assistant District Administrator	2009 to present
Warehouse 21 (Santa Fe Teen Arts Center)	President, Treasurer, director	2004 to 2017 (president 2012 to 2015; treasurer 2006 to 2012)

28. Avocational interests and hobbies

Answer 28: Youth activities, baseball, cooking, music, reading, golf

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.

Answer 29: No.

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify

Answer 30: No.

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

Answer 31: No.

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: No.

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

Answer 33: No.

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).

Answer 34: Yes. In October 2014, I was named as a defendant in a complaint filed in the Fifth Judicial District Court. The complaint alleged a failure by another attorney, who was of-counsel to Hemphill & Grace, P.C., to file a complaint within the statute of limitations in a personal injury action. Although I had no personal involvement in the matter, I was named as a defendant because my name was on the firm letterhead. I was voluntarily dismissed as a defendant by the plaintiff, and the case subsequently settled.

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

Answer 35: No.

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?

Answer 36: N/A.

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: N/A.

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes.

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No.

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: I own my law practice.

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No.

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes. I am 64 years of age, I have been practicing law continuously for more than 38 years, and I have been a resident of New Mexico since July 2000. I reside within the First Judicial District.

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43: After practicing law for almost 39 years, I believe I have the training, experience, and temperament to be a judge. There is a tradition of community service in my family, and such service has always been more important to me than making money. I attended night school for my legal education because I needed to work full time to support myself and to pay tuition. At the end of my third year, I was named Editor in Chief of the Law Review, which gave me an opportunity to hone my research, writing, and administrative skills.

I have spent most of my legal career as a litigator handling civil and administrative claims. I had some experience with criminal law early in my career, and I keep up with developments in the field. In my private practice, I represent individuals and small businesses in a wide variety of matters including personal injury claims, commercial disputes, real estate matters, estate planning, probate, guardianships, and even traffic violations. As a lawyer representing the federal government, I defended administrative decisions ranging from rulemaking to receivership appointments, and prosecuted civil claims against directors and officers of financial institutions as well as other individuals and businesses in federal courts throughout the United States. In that role, I had an opportunity to handle cases against some of the most prominent attorneys and law firms in the country, frequently developing legal precedent where none previously existed. Following my service with the federal government, I was a partner in the Washington, D.C. office of a large international law firm, a partner in a 35-lawyer firm in Baltimore, Maryland, a partner in a two-lawyer firm in Santa Fe, New Mexico, and finally, a sole practitioner.

I am a strong advocate for alternative dispute resolution programs. As a mediator and settlement facilitator in the First Judicial District Court's Alternative Dispute Resolution program, I have worked to bring parties to resolution of issues involving custody and child support, personal injury claims, employment matters, real estate disputes, foreclosures, and vehicle forfeitures. I also volunteer regularly as a mediator in the Resolution Day program in Family Court. I would like to see the expansion of programs that emphasize problem-solving outside of the courtroom in order to increase access to justice for more of our citizens while relieving the burden on traditional courts. The success of such programs is dependent upon the participation of local lawyers as well as a judiciary interested in fostering discussion and compromise whenever possible.

Clearly a judge must strive for impartiality and serve in a fair and unbiased manner. A judge can make a difference by treating every person who appears before the Court with dignity and respect, and with an assurance that their issues will be considered with the importance they deserve. Respect is shown for litigants and lawyers not only by how they are treated in open court, but by how a judge is prepared to deal with the issues they present for resolution. A judge must work hard to achieve this goal, and I have always prided myself on appearing in court fully prepared and conversant with the issues.

A judge must be socially aware and should participate appropriately in the life and struggles of the community. I have always been active in community organizations because I find great joy in participating in the lives of those around me. My involvement with Little League, my temple, and other community organizations helps to ground me and to keep me in touch with the community. I firmly believe that community involvement is also important for judges because it "humanizes" the bench, increases awareness of the pressures on the judiciary, and ultimately fosters support for the legal system. I look forward to an opportunity to serve the people of New Mexico as a District Judge.

44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?

Answer 44: Yes.

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, the original letters must be mailed directly from the source to the Judicial Selection Office.
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:

Paul W. Davis

Date:

8-22-17

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. D-0101-CV-2012-00785

COMPASS BANK,

Plaintiff,

vs.

ELIZABETH R. LINDSEY, T. JOSEPH KRAUS,
INDYMAC BANK, F.S.B., LOS ALAMOS
NATIONAL BANK, and ABN AMRO
MORTGAGE GROUP, INC.,

Defendants.

DEFENDANTS' POST-TRIAL BRIEF ON STANDING

COME NOW Defendants, T. Joseph Kraus and Estate of Elizabeth Lindsey, by and through their undersigned attorney, Paul W. Grace, L.L.C., and submit this Post-Trial Brief on the issues of Plaintiff's Standing. A separate Brief is being filed on the issue of the validity of the Note and Mortgage. Defendants incorporate by reference their Proposed Findings of Fact and Conclusions of Law being filed this date.

This is an action to enforce a note and foreclose a mortgage. In order to establish its standing to bring these claims, Compass Bank must prove that it had the right to enforce the Note and to foreclose the Mortgage at the time the Complaint to Foreclose was filed. *Deutsche Bank National Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 20, 369 P.3d 1046.

A plaintiff can seek to enforce a Note by proving that it had both physical possession of the Note and the right to enforce it through a proper indorsement or transfer. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 21, 320 P.3d 1. Here, Compass Bank asserts that the original Note has been lost. In that event, a plaintiff must establish that it had physical possession of the

original Note and the right to enforce it at the time the Note was lost, in addition to when the Complaint was filed.

Compass Bank has not Established Possession of the Original Note

Plaintiff's Trial Exhibit 14-3 was introduced during the testimony of Tom Burnett-Morrow from RoundPoint. This is a copy of a page from the Collateral Vault Master Inventory, which was supervised by Mr. Burnett-Morrow in early 2010 following the receivership of Guaranty Bank, relating to the Lindsey Loan prepared by a member of his staff. Although that form contains an "X" in boxes indicating that the original Note, the Original Deed of Trust/Mortgage, and the original Title Policy were found in the Guaranty Bank loan records, Mr. Burnett-Morrow was unable to explain how his staff member confirmed that the documents located at Guaranty Bank were actually original documents or that the Note found in the files was indorsed to Guaranty Bank.

According to Jared Fink, the RoundPoint client representative at trial, RoundPoint, as the loan servicer, had the right to inspect files held by the custodian, Branch Banking. On December 8, 2010, an employee of RoundPoint prepared a document headed "Key Collateral File," which indicates that the original Note, Recorded Deed of Trust, Assignment, and Title Policy were "missing" from the collateral file as of that date. Plaintiff's Trial Exh. 39. Although Mr. Fink could not confirm whether the RoundPoint employee had conducted a review of files held by Branch Banking or some other files held by RoundPoint, the existence of a document stating that original loan documents could not be found in the "Key Collateral File" in late 2010 undermines Compass Bank's assertion that it was in possession of the original Note at the time the Complaint for Foreclosure was filed in March 2012.

The only witness produced by Compass Bank who claimed personal knowledge that the original Note ever was in the possession of Compass Bank or its agents was Susan Tittl, the document control supervisor for Branch Banking & Trust, which had been engaged by Compass Bank to keep custody of the tens of thousands of loan files previously maintained in Guaranty Bank's vault. Ms. Tittl testified that on May 24, 2011, she faxed loan documents for the Lindsey Loan, including the Note, to RoundPoint, the loan servicer for Compass Bank. Although Ms. Tittl believed that the pages that were sent through the fax machine were original documents, she could not explain what led her to conclude that the documents she faxed were in fact originals (e.g., blue-ink signatures).

A copy of the pages received by RoundPoint via fax on May 24, 2011, was introduced as Plaintiff's Trial Exhibit 16-2. The copy of the Note contained in Exhibit 16-2 shows a number (2316558) at the top right of each page, and a bar code at the bottom right of the first page. The last page of the Note reflects an indorsement from Guaranty Residential Lending, Inc. to Guaranty Bank. That exhibit consists of pages bearing a fax line at the top of each page showing the date and time of transmission, the name and fax phone number for the source of the transmission, and page numbers. The first page of Exh. 16-2 is "p 3." It is followed by additional pages marked consecutively "p 4/36" through "p 36/36." The first two pages of the faxed document were not produced. Assuming that "p 1" likely was a fax cover sheet, Plaintiff still was not able to account for "p 2." It is not far-fetched to assume that "p 2" may have been correspondence describing what documents were being faxed and confirming whether the source documents were original documents or copies. The absence of "p 2" gives rise to uncertainty concerning whether Branch Banking actually had custody of the original loan documents as Compass Bank's agent in May 2011.

Ms. Tittl testified that she responded to a Request for Release of Documents and Receipt from RoundPoint and, on October 26, 2011, shipped the “Mortgage File” held by Branch Banking to Castle Stawiarski, the law firm that subsequently filed Plaintiff’s Complaint for Foreclosure. The Request for Release (Plaintiff’s Trial Exh. 36) did request the release of original documents. Plaintiff’s Trial Exhibit 37 is an undated shipping label addressed from Ms. Tittl to the Castle Firm. However, Plaintiff produced no cover letter or other evidence confirming what was actually contained in the package shipped to the Castle Firm.

Carolyn Kelm, the former document control supervisor for the Castle Firm, testified that it was Castle’s practice to scan any documents received immediately upon receipt into the firm’s Blue Train case management system. Ms. Kelm was based in the firm’s Colorado office and had no personal involvement with the Lindsey litigation or loan documents during the firm’s representation of Compass Bank. She testified that a copy of the documents received from Branch Banking and scanned into the Blue Train system are contained in Plaintiff’s Trial Exhibit 38. However, Ms. Kelm acknowledged that she printed out the documents contained in Exhibit 38 in November 2015, more than four years after documents from Branch Banking would have been scanned into the Blue Train system. Further, the first three pages of Exhibit 38 are dated April 16, 2014, showing that the mere presence of documents in the Blue Train system is no evidence of when they were received and scanned into the system. Thus, there is no reliable testimony or evidence that the original Lindsey Loan documents were shipped from Branch Banking and received by the Castle Firm in October 2011.

The copy of the Note contained in Exhibit 38, like the copy of the Note contained in Exhibit 16-2, shows the number at the top right of each page, the bar code at the bottom right of the first page, and the indorsement on the last page of the Note. If, in fact, these exhibits

represent copies of original loan files, including the original indorsed Note, which were sent to the Castle Firm in October 2011, it is inexplicable that the copy of the Note appended to the Complaint for Foreclosure filed by the Castle Firm on March 16, 2012 (Defendants' Trial Exh. G) does not contain the indorsement of the Note to Guaranty Bank.

In 2014, Compass Bank hired the law firm of Rose Little & Associates to take over the foreclosure litigation from the Castle Firm. Ms. Kelm testified that the Lindsey Loan files in the possession of the Castle Firm were transferred with a "Bailee Letter" dated April 16, 2014, to a courier for Rose Little & Associates. Susan Dranttel, the Senior Managing Litigation Attorney with Rose L. Brand, the successor to Rose Little & Associates, testified that it was the policy and practice of Rose Little & Associates to immediately register into its own case management system the receipt of documents from a lender or from another firm for which it was taking over as foreclosure counsel. She testified that the Bailee Letter from the Castle Firm was not entered into the Rose Little case management system for over a year after the date of the Bailee Letter. Further, she testified that she reviewed the documents in the Rose Little system received from the Castle Firm and determined that none of the loan documents were originals. She found no record in the firm's system that Rose Little ever had received original loan documents for the Lindsey Loan.

During her testimony, Ms. Dranttel was asked to review the "Affidavit of Lost Note" that she submitted earlier in the case, which is Plaintiff's Trial Exhibit 30. She testified that the documents attached to her Affidavit were not retrieved from the records of Rose Little, but were provided to her by Plaintiff's current foreclosure counsel to be attached to her Affidavit.

If, in fact, the Rose Little Firm received the loan documents relating to the Lindsey Loan from the Castle Firm, then the pages in exhibits introduced at trial to show copies of what was

sent by the Castle Firm and what was received by the Rose Little Firm should be identical, but they are not. For example, the copy of the Note contained in Plaintiff's Trial Exhibit 38 (represented to be the Bailee Letter and accompanying documents sent by the Castle Firm to Rose Little) shows the loan number at the top right of each page and a bar code at the bottom right of the first page. However, in Plaintiff's Trial Exhibit 30 (the Dranttel Affidavit and accompanying documents purportedly received from the Castle Firm by Rose Little), the loan numbers and the bar code on the Note are excised.

RoundPoint commissioned Jared Fink to conduct an investigation to locate the missing original Note during 2014 and 2015. Mr. Fink testified that he questioned representatives from Branch Banking, from the Castle Firm, and from the Rose Little Firm, none of whom had the original Note. He also testified that it was standard practice for a foreclosing plaintiff to provide foreclosure counsel with original loan documents to perfect the plaintiff's right to foreclose. Yet, he never questioned a representative from Susan C. Little & Associates, which had been retained by Guaranty Bank as foreclosure counsel in connection with a 2008 Complaint that was filed against the Defendants relating to the same loan. Defendants' Trial Exhibit H. It appeared from his testimony that Mr. Fink was not even aware of the existence of this other potential custodian of the original loan files from a time predating Guaranty Bank's failure.

The confusion as to the loan documentation in Plaintiff's Trial Exhibits compels the conclusion that Plaintiff has failed to establish that it had actual physical custody of the original Note either at the time the Complaint was filed or at the time that Plaintiff claims the original Note was lost.

Compass Bank has not Established the Legal Right to Enforce the Note

The Note executed by Ms. Lindsey was payable to Guaranty Residential Lending, Inc. During the litigation, a copy of the Note was produced showing a stamp indorsing the Note to Guaranty Bank, FSB. The indorsement was not dated and no evidence was presented to establish that the original Note, as opposed to a copy, was indorsed. Guaranty Bank failed in 2009, and the FDIC was appointed as its Receiver. Compass Bank entered into a Purchase and Assumption Agreement with the Receiver whereby Compass Bank agreed to purchase substantially all of Guaranty Bank's assets and to assume its deposit liabilities. Schedules attached to the Purchase and Assumption Agreement suggested that the Lindsey Loan was one of the assets purchased by Compass Bank. Plaintiff's Trial Exh. 13. Plaintiff acknowledges that the Note was never indorsed to Compass Bank.

Even if Compass Bank had physical possession of the original Note both at the time the Complaint was filed and at the time the Note was lost, which it has not established, mere possession of a Note payable to a third party is insufficient to establish the right to enforce the Note. 320 P.3d 1. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 23, 320 P.3d 1; *Johnston*, 2016-NMSC-013, ¶ 32. In the Purchase and Assumption Agreement, the FDIC expressly disclaimed any warranties as to the assets purchased by Compass Bank "with respect to title, enforceability, collectability, documentation ... or any other matters. Plaintiff's Trial Exh. 13, Section 3.3, at page 12 (emphasis added). The Purchase and Assumption Agreement also provided a mechanism for the Receiver and Compass Bank to perfect the acquiring institution's interest in any asset purchased.

Section 9.2 of the Purchase and Assumption Agreement provided, in pertinent part:

The Receiver, the Corporation and the Assuming Bank each agree, at any time, and from time to time, upon the request of any party hereto, to execute and deliver such additional instruments and documents of conveyance and take such other action as shall be reasonably necessary to vest in the appropriate party its full legal or equitable title in and to the property transferred pursuant to this Agreement or to be transferred in accordance herewith.

Id. at 29 (emphasis added). To further facilitate the process, the Agreement contemplated the execution of a power of attorney by the Receiver in favor of Compass Bank “in a form necessary to effectuate the intent of this Section 9.2 to this Agreement.” *Id.* Plaintiff produced no evidence that this course of action was ever pursued by Compass Bank, and it is clear from the testimony presented at trial that Compass Bank never requested the Receiver to indorse the Lindsey Note to Compass Bank or even to execute the power of attorney to facilitate that process. Instead, Plaintiff argued that it was impractical to require the FDIC as Receiver for a failed bank to indorse each and every Note that it sells to the acquiring institution. Defendants never argued that such a burdensome task was required, particularly in view of the simple solution presented by the Purchase and Assumption Agreement itself for this one specific loan.

Indorsement of the Note to Compass Bank was an essential prerequisite to establish Plaintiff’s right to enforce the Note. The Supreme Court observed in *Bank of New York v. Romero*, that there are “three ways in which a third party can enforce a negotiable instrument such as a note.” 2014 NMSC 007, ¶ 20, citing NMSA 1978, § 55-3-301 (1992). That statute provides:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 55-3-309 or 55-3-418(d) NMSA 1978. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Subparagraph (ii) does not apply because Compass Bank acknowledges that it does not have possession of the Note. Section 55-3-418(d) is inapplicable because it deals with payment or acceptance of an instrument by mistake. Section 55-3-309, discussed below, concerns lost notes, and may apply when "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred."

Compass Bank was never a "holder" of the Note. NMSA 1978, § 55-3-302 provides that "'holder in due course' means the holder of an instrument if: (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity" (Emphasis added). The Note clearly was not "issued" to Compass Bank, so the question is whether it was "negotiated" to Compass Bank. "Negotiation" is addressed in NMSA 1978, § 55-3-201, which provides:

- (a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby became its holder.
- (b) Except for negotiation by remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

(Emphasis added). The Note was payable to Guaranty Bank as a result of the indorsement by Guaranty Residential Lending, Inc. It was never made payable to bearer (i.e., signed in blank). Thus, Compass Bank cannot establish its status as a lawful holder in due course of the Note in the absence of an indorsement.

The law also provides a mechanism to protect a transferee of a Note who cannot establish its right to enforce the Note because of a missing indorsement. NMSA 1978, § 55-3-203 provides, in pertinent part:

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving the person receiving delivery the right to enforce the instrument.

...

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(Emphasis added). Thus, although the Plaintiff did not become a holder entitled to enforce the Note because of the lack of an indorsement of the Note to Compass Bank, it had a “specifically enforceable right to the unqualified indorsement” of the Note. Negotiation of the instrument to Compass Bank legally could not occur in the absence of the indorsement. As noted above, Compass Bank failed to pursue this option with the Receiver. The New Mexico Supreme Court emphasized the importance of the indorsement requirement in *Romero*: “When an instrument is payable to an identified person, only that person may be the holder. A person in possession of an instrument not made payable to his order can only become a holder by obtaining the prior holder’s indorsement.” 2014 NMSC 007, ¶ 25 (citation omitted).

The third way that a party can seek to enforce a Note is pursuant to NMSA 1978, § 55-3-309(a) (1992), the lost note statute, which requires the party to show that it was in actual physical possession of the Note, and legally entitled to enforce it, when the loss of possession occurred. For the same reasons that Compass Bank has failed to prove that it had the original Note at the time the Complaint was filed, discussed above, it also has failed to establish that it had actual physical possession of the original Note when it was purportedly lost. Further, because the Note was never indorsed to Compass Bank, and it made no effort to secure its right to an unqualified indorsement of the Note, Compass Bank cannot establish that it was legally entitled to enforce the Note at the time the original Note was lost.

Compass Bank has not Established its Right to Foreclose the Mortgage

In addition to proving that it had possession of the original Note and the legal right to enforce it, Compass Bank also is required to establish its right to foreclose the Mortgage. On January 9, 2008, an Assignment of Mortgage was executed assigning the August 20, 2004 Mortgage from Guaranty Residential Lending, Inc. to Guaranty Bank, FSB. Plaintiff's Trial Exh. 7. After Guaranty Bank failed and Compass Bank purchased its assets, Compass Bank executed a Limited Power of Attorney in favor of RoundPoint on December 24, 2009, which was recorded on May 12, 2010. Plaintiff's Trial Exh. 20. The purpose of the Limited Power of Attorney was expressed in the document: "In order for Servicer to perform its obligations under the Servicing Agreement with respect to servicing and administering the Loans ... for the benefit of Owner." *Id.* at bates page RPM001273. The FDIC was not a party to the Limited Power of Attorney between Compass Bank and RoundPoint, and the Limited Power of Attorney extended no authority for RoundPoint to take any action or to execute documents on behalf of the FDIC. *Id.*; Testimony of Keith Carson (FDIC); Testimony of Tom Burnett-Morrow (RoundPoint).

On February 23, 2012, RoundPoint executed an Assignment of Mortgage invoking the Limited Power of Attorney between Compass Bank and RoundPoint. The document stated:

Compass Bank, successor in interest to the FDIC as Receiver for Guaranty Bank, holder of a mortgage, from Elizabeth R. Lindsey to Mortgage Electronic Registration Systems, Inc. as nominee for Guaranty Residential Lending, Inc. dated August 30, 2004 and recorded August 26, 2004, as Document No. 1343598 of the records of Santa Fe County, New Mexico, hereby assigns said mortgage and the obligations secured thereby to Compass Bank....

The signature line of the document indicates that it was executed by Dawn Adams, RoundPoint's Vice President – Foreclosure, on behalf of "Compass Bank, successor in interest to the FDIC as Receiver for Guaranty Bank by RoundPoint Mortgage Servicing Corporation as attorney in fact

pursuant to a Limited Power of Attorney recorded May 12, 2010.” *Id.* The Limited Power of Attorney expressly referred to in the Assignment is the document contained in Plaintiff’s Trial Exh. 20 between Compass Bank and RoundPoint. Testimony of Jared Fink (RoundPoint).

Because neither RoundPoint nor Compass Bank possessed any authority to execute documents on behalf of the FDIC as Receiver for Guaranty Bank by virtue of the Limited Power of Attorney, the Assignment of Mortgage purporting to assign the Lindsey Mortgage from the FDIC as Receiver for Guaranty Bank to Compass Bank was a nullity and did not vest in Compass Bank any right to foreclose the Mortgage.

Defendants are not Precluded from Asserting Affirmative Defenses

Plaintiff argues that Defendants are barred from asserting their affirmative defenses to foreclosure because of the administrative exhaustion requirement of 12 U.S.C. § 1821(d)(13)(D), and because Defendants failed to list those defenses in their Bankruptcy schedules. Neither argument has merit.

It is well established that the administrative exhaustion requirement contained in 12 U.S.C. § 1821(d)(13)(D) does not apply to affirmative defenses. *Resolution Trust Corp. v. Midwest Federal Sav. Bank of Minot*, 36 F.3d 785, 793 (9th Cir. 1994). The Tenth Circuit, in *Resolution Trust Corp. v. Love*, 36 F.3d 972, 976-78 (10th Cir. 1994), specifically ruled that administrative exhaustion is not a bar to assertion of affirmative defenses by a borrower against the Receiver or an acquiring institution in a foreclosure proceeding. See *National Credit Union Admin. Bd. v. JPMorgan Chase Bank, N.A.*, 2013 WL 4736374, at *3 (D. Kan. Sept. 3, 2013) (administrative exhaustion requirement is not applicable to defenses asserted against a purchaser of assets from the Receiver); cf. *Bloom v. Federal Deposit Ins. Corp. (In re First State Bancorporation)*, 498 B.R. 322, 332 (Bankr. N.M. 2013) (the administrative exhaustion

requirement does not divest a Bankruptcy Court of jurisdiction to adjudicate affirmative defenses to a claim of the receiver in connection with allowing or disallowing claims against a bankruptcy estate).

Plaintiff's argument that Defendants should be barred from asserting their affirmative defenses because they did not report such defenses on the schedules filed in their Bankruptcy proceeding also is without merit. The case primarily relied upon by Plaintiff, *Edwards v. Franchini*, 1998-NMCA-128, 125 N.M. 734, 965 P.2d 318, is easily distinguishable. In *Edwards*, the plaintiff sought to pursue affirmative claims for monetary relief against the defendants for legal malpractice after the plaintiff was discharged in a bankruptcy. The plaintiff had failed to list the affirmative claims for legal malpractice as an asset in his bankruptcy schedules. The Court of Appeals affirmed dismissal of plaintiff's affirmative claims for monetary relief because such affirmative claims are the property of the bankruptcy estate and do not revert to the debtor upon discharge. 1998-NMCA-128, ¶¶ 4-5.

By contrast, the Defendants here are simply raising affirmative defenses against claims being asserted against them by the Plaintiff. Affirmative defenses are not assets to be listed in bankruptcy schedules. They do not seek payment nor are they claims, causes of action, or actions seeking a determination of rights. *Resolution Trust Corp. v. Love*, 36 F.3d 972, 976 (10th Cir.1994). Defendants had no obligation to list potential affirmative defenses to Plaintiff's foreclosure claims, and Defendants' failure to list such defenses in bankruptcy schedules does not preclude them from raising the defenses in subsequent foreclosure litigation.

Plaintiff's also argue that Defendants' failure to list their affirmative defenses in their bankruptcy schedules raises a question of judicial estoppel. In *Santa Fe Pacific Trust v. City of Albuquerque*, 2012-NMSC-028, ¶ 32, 285 P.3d 595, the Supreme Court stated:

Three elements must be addressed for a party to prevail under the doctrine of judicial estoppel. First, the party against whom the doctrine is to be used must have successfully assumed a position during the course of litigation. Second, that first position must be necessarily inconsistent with the position the party takes later in the proceedings. Finally, while not an absolute requirement, judicial estoppel will be especially applicable when the party's change of position prejudices a party who had acquiesced in the former position.

Application of judicial estoppel comes into play when a party attempts to play fast and loose with the judicial process. *Id.*, ¶ 33. *See, e.g., Guzman v. Laguna Development Corp.*, 2009 NMCA 116, ¶ 13, 219 P.3d 12 (defendants successfully argued that there was no remedy under the Workers Compensation Act, and later argued that the exclusive remedy for plaintiff's injuries was under the Workers Compensation Act). Defendants here assumed no particular legal position in their bankruptcy proceeding with respect to the Note and Mortgage; they simply filed schedules of their assets and liabilities as required. They were not required to schedule potential affirmative defenses that might come into play in the event of a foreclosure proceeding.

The Defendants received their bankruptcy discharge on June 5, 2009 (Plaintiff's Trial Exh. 33). In this foreclosure proceeding filed almost three years after discharge, there is nothing inconsistent in the Defendants' assertion of affirmative defenses to Plaintiff's attempt to foreclose on their home, which was listed as an asset in the Bankruptcy Schedules (*id.*). Further, there is no evidence that Plaintiff relied upon Defendants' failure to list affirmative defenses in their bankruptcy proceeding, or that Plaintiff was prejudiced in any way by Defendants' actions. *Cf. Laughlin v. Convenient Management Systems*, No. 32074, ¶ 17, 308 P.3d 992, 997-98 (N.M. App. 2013) (even if first two elements are satisfied, judicial estoppel is not appropriate in the absence of a showing of prejudice to the other party).

Conclusion

Plaintiff has failed to demonstrate possession of the original Note and the right to enforce it at the time the Complaint was filed and at the time that the original Note purportedly was lost. Plaintiff also has failed to establish its right to foreclose the Mortgage. The Defendants had no obligation to exhaust administrative remedies with respect to their affirmative defenses, and were not required to schedule their affirmative defenses in their Bankruptcy proceeding. As a result, judgment must be entered in favor of the Defendants dismissing Plaintiff's claims.

Respectfully submitted,

PAUL W. GRACE, L.L.C.

By: /s/ Paul W. Grace

Paul W. Grace, Esq.
117 N. Guadalupe St., Ste. A
Santa Fe, NM 87501
Telephone: (505) 690-8505
Fax: (505) 986-2009
Attorney for Defendant Kraus
paulgracelaw@gmail.com

I hereby certify that a copy
of the foregoing was served
on counsel of record this 12th
day of May, 2017 via the
court's CM/ECF electronic
filing system.

/s/ Paul W. Grace

References – Paul W. Grace

Elliot Rapoport
216 West Lupita Road
Santa Fe, NM 87505
505-982-8143

Rabbi Martin Levy
1860 Forest Circle
Santa Fe, NM 87505
505-670-4671

T. Joseph Kraus
2317 Calle Halcon
Santa Fe, NM 87505
505-780-0273

David Pollak
1 Frasco Way
Santa Fe, NM 87508
(505) 660-4928

Carol A. Clifford, Esq.
The Jones Firm
1800 Old Pecos Trail
Santa Fe, NM 87505-4759
(505) 982-0011

Sheldon Weinstein, Esq.
9 Calle de Montanas
Santa Fe, NM 87507
505-467-8115

James E. Bristol, III, Esq.
Bristol Family Law LLC
339 W. Manhattan Ave.
Santa Fe, NM 87501-2650
505-992-3456

Lynn Kelly
2802 Calle Campeon
Santa Fe, NM 87505
505-690-0283